CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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VIA U.S. MAIL AND ELECTRONIC MAIL

The Honorable Larry Hogan
100 State Circle
Annapolis, MD 21401-1925

RE: Constitutional and Practical Issues with House Bill 1498

Dear Governor Hogan:

On behalf of the Center for Competitive Politics ("the Center"),[1] we respectfully submit the following comments addressing constitutional and practical issues with portions of House Bill 1498, which has passed the General Assembly and will soon be delivered to your desk.[2] Among other things, this legislation amends the state's election law to create new reporting requirements for "participating organizations" that make independent expenditures or publish information that simply mentions the name of a candidate in a specified window before a primary or general election. The bill also introduces joint-and-several liability for treasurers as well as for anyone who controls a "participating organization." The provisions of H.B. 1498 would ultimately chill protected speech by mandating the general disclosure of donors to organizations incidentally engaged in political activity.

In short, the legislation proposes new and burdensome reporting requirements for organizations. Furthermore, the bill extends onerous disclosure requirements to "participating organization" funders, whether or not the donors agree with specific communications. Finally, H.B. 1498 imposes onerous joint-and-several liability on the officers of corporations for minor violations. Those severe penalties include stripping corporate employees of their personal First Amendment rights.

I. House Bill 1498's mandated disclosure is not properly tailored to a substantial governmental interest.

a. House Bill 1498 requires disclosure that is beyond the state's interest.

Under the First Amendment and United States Supreme Court guidance, campaign finance disclosure must be directed toward groups seeking some electoral outcome. Courts review state and federal laws demanding donor lists under "exacting scrutiny," which demands "a 'relevant correlation' or

[1] The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Just this past year, we secured judgments in federal court striking down laws in the states of Colorado and Utah on First Amendment grounds. We are also currently involved in litigation against California, Missouri, and the federal government.

[2] Campaign Finance - Political Organizations – Compliance and Disclosure, H.B. 1498, 2017 Reg. Sess. (MD 2017) (as Enrolled) ("H.B. 1498").

'substantial relation' between the governmental interest and the information required to be disclosed."[3] This heightened scrutiny is required because, under the First Amendment, "compelled disclosure… cannot be justified by a mere showing of some legitimate governmental interest."[4] Therefore, the Supreme Court has long demanded a nexus between campaign finance disclosure and actual campaign-related activity in order to protect organizations merely discussing questions of public policy.[5]

Candidate committees (and, in the state law context, ballot issue committees) obviously support or oppose electoral outcomes and are campaign-related.[6] Organizations with the "major purpose" of supporting or opposing candidates or ballot issue questions are also subject to campaign finance disclosure.[7] But if an organization is neither controlled by a candidate nor has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate only for activity that is "unambiguously campaign related."[8] The more disclosure is divorced from the interest of who is speaking about candidates or ballot issues, the greater the threat to protected issues speech under the First Amendment.

But H.B. 1498 attempts to mandate *general* donor disclosure for organizations that are not candidate committees nor organizations spending most of their money on politics. Here's how the measure works: H.B. 1498 defines a "participating organization" as an "entity that (i) is organized under § 501(c)(4) or (6)… of the Internal Revenue Code" and that "makes political disbursements."[9] "Political disbursements" are "contribution[s] to a political committee"[10] or "a disbursement to a person making an independent expenditure or… electioneering communication"[11] in Maryland. Political disbursements may also be a "disbursement to an out-of-state political committee that makes a disbursement in" Maryland.[12] Once qualified as a "participating organization," the entity must file detailed disclosure reports[13] of its "donations" or disclose that information on the organization's own website.[14] At their core, "donations" are any "thing of value"[15] that are not expressly prohibited, in writing, from being used for either independent expenditures or electioneering communications.[16]

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[3] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).
[4] *Id.*
[5] *Id*. at 14 (noting "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs… of course includ[ing] discussions of candidates….") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (brackets and ellipses in *Buckley*).
[6] *Id.* at 79.
[7] *Id.*
[8] *Buckley*, 424 U.S. at 81.
[9] H.B. 1498 § 1 at p. 17 (modifying § 13-309.2.(a)(3)). The definition of "participating organization" in H.B. 1498 also lists § 527 organizations. By its express terms, 26 U.S.C. § 527 governs the taxation of political organizations "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). Under IRC § 527, an "exempt function" is "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization…." 26 U.S.C. § 527(e)(2). Therefore, the concern is the regulation of §501(c)(4) and (6) organizations, which, by definition, are not primarily political. *See, e.g.*, John Francis Reilly and Barbra A. Braig Allen, "Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6)" L2, Organizations, Internal Revenue Service, 2003 EO CPE Text: Exempt Organizations-Technical Instruction Program for FY 2003 (2003) ("IRC 501(c)(4), (c)(5), and (c)(6) organizations may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the organization's primary activity.") Available at: https://www.irs.gov/pub/irs-tege/eotopicl03.pdf.
[10] H.B. 1498 § 1 at p. 17 (modifying § 13-309.2.(a)(4)(i)).
[11] H.B. 1498 § 1 at p. 17 (modifying § 13-309.2.(a)(4)(ii)).
[12] H.B. 1498 § 1 at p. 17 (modifying § 13-309.2.(a)(4)(iii)). Better drafting protocol would have either defined "disbursement" separately from "political disbursement" or used another defined term. The bill is confusing when it uses a word in its own definition. Existing law uses the word "donation," which is defined elsewhere in the Election Code, *see, id.*, and may have been easier for Maryland citizens to understand.
[13] *See, e.g.*, H.B. 1498 § 1 at p. 18-19 (modifying § 13-309.2.(c)(3)(ii)).
[14] H.B. 1498 §1 at 19 (modifying §13-309.2.(d)(1) to allow disclosure on the organization's website).
[15] H.B. 1498 §1 at 17 (modifying §13-309.2.(a)(2)(i)).
[16] H.B. 1498 §1 at 17 (modifying §13-309.2.(a)(2)(ii)(2)).

Thus, any § 501(c)(4) social welfare organization or § 501(c)(6) business league runs the risk of being forced to disclose its general donors even if those donors never earmarked their funds for political activity. It does not matter if such a group must disclose to the state, or on the organization's own website – the damage to the donors' privacy happens as soon as their names and addresses are disclosed publicly.

It is troubling that labor unions, which are organized under the tax code at 26 U.S.C. § 501(c)(5), do not bear these burdens at all. Instead, the law specifically skips over unions in going from social welfare organizations (§ 501(c)(4)) to business leagues (§ 501(c)(6)). In effect, the state is choosing to prefer some speakers over others by unequally applying disclosure and registration requirements between unions and business leagues. The law should apply evenly to organizations incidentally engaging in political activity. The state should not discriminate based upon the identity of the speaker.[17]

Maryland simply lacks a sufficient governmental interest to demand the general donors of § 501(c)(4) social welfare organizations or § 501(c)(6) business leagues. Neither organization type has as its major purpose political activity or supporting or opposing candidates. The state's interest, therefore, is limited to those donors who earmarked their funds for political activity. In any event, Maryland's law should be the same for social welfare and business organizations as it is for labor unions.

b. The bill requires disclosure that is not properly tailored to the state's interest.

For the sake of argument, even if the state has an interest in compelling such general disclosure, the reporting must be tailored to that interest and be in balance with the burdens it places on speakers. If the state's demand for disclosure is too onerous – demanding regular registration and reporting to the state or demanding specialized corporate forms in order to speak – then it may be too burdensome under the First Amendment. Thus, the *scope and method* of the state's disclosure system matters too. One-time, event-driven reports are less burdensome, and therefore more likely to survive a federal court's exacting scrutiny, than the continual reporting mandated of Political Action Committees ("PACs"). H.B. 1498 imposes PAC-like status on speakers,[18] and in that manner goes too far.

It is sometimes said that the Supreme Court's decision in *Citizens United v. Federal Election Commission*[19] upheld the constitutionality of "disclosure," but, in fact, the Court approved only a particular, narrow type of disclosure subject to a large array of statutory and regulatory limitations. It did not reverse a long line of precedent placing limits on disclosure. Rather, the Court merely upheld the disclosure of an independent expenditure report for an electioneering communication, which discloses the *entity making the expenditure* and the purpose of the expenditure.[20] Additionally, the federal report only discloses contributors giving over $1,000 *for the purpose of furthering the communication*.[21] This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures,[22] an interpretation recently upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving analogous "electioneering communication" reporting requirements.[23]

By contrast, this legislation proposes, in many cases, general donor disclosure of the names and addresses of everyone who contributes at a certain threshold to an entity that makes public communications

[17] *See, e.g., Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected.").
[18] *See, e.g.*, H.B. 1498 §1 at 18 (modifying §13-309.2(c)(2) to require multiple reporting within 48 hours each time an organization spends $10,000 in the aggregate since its last report).
[19] 558 U.S. 310, 369 (2010).
[20] 52 U.S.C. § 30104(f)(2)(A)-(D).
[21] 52 U.S.C. § 30104(f)(2)(E)-(F); *Citizens United*, 558 U.S. at 366-367.
[22] 11 C.F.R. § 104.20(c)(9).
[23] *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding 11 C.F.R. § 104.20(c)(9)).

of $10,000 or more that simply mention the name of a candidate close in time to an election.[24] This is not like the disclosure at issue in *Citizens United*, and instead resembles the disclosure regimes designed for PACs. In contrasting the disclosure burdens dealt with by the Court in the 1986 case *Massachusetts Citizens for Life, Inc. v. Federal Election Commission* ("*MCFL*"),[25] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech," such as those proposed in H.B. 1498.[26]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[27] Likewise, Justice O'Connor was concerned with the "organizational restraints" imposed upon nonprofit corporations, including "a more formalized organizational form" and a significant loss of funding availability.[28]

If this bill becomes law, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. H.B. 1498 would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations. Thus, the bill would likely place a heavy burden of accounting and record keeping on any entity that speaks using the name of a candidate.

II. House Bill 1498's disclosure requirements may materially harm organizations in Maryland and their donors.

a. The type of disclosure mandated by H.B. 1498 would impinge upon donors' freedom of association and potentially deter individuals from contributing to regulated organizations.

The Supreme Court has emphasized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[29] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[30] Thus, the Court recognized that two rights touch on associations and civic groups. First, the First Amendment protects the right to engage in debate concerning public policies and issues, and, second, to protect that right, the Constitution protects the right to associational privacy. But the freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference,"[31] such as registration and disclosure requirements and the attendant sanctions for failing to disclose.

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association – in particular, from disclosure of an organization's contributors and members – by subjecting "state action which may have the effect of curtailing the freedom to associate… to the closest scrutiny."[32] In *Buckley*,

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[24] H.B. 1498 §1 at 18 (modifying §13-309.2.(c)(2) to require multiple reporting within 48 hours each time an organization spends $10,000 in the aggregate since its last report).
[25] 479 U.S. 238 (1986).
[26] *Citizens United*, 558 U.S. at 369 (contrasting federal independent expenditure reports with the burdens discussed in *MCFL*).
[27] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[28] *Id*. at 266 (O'Connor, J. concurring).
[29] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-461 (1958) ("*NAACP v. Alabama*").
[30] *Id*. at 462 (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association.").
[31] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions.").
[32] 357 U.S. at 460-61; *see also id*. at 462.

the Supreme Court directly addressed both the associational rights discussed in *NAACP v. Alabama* and the "[d]iscussion of public issues"[33] – now referred to as "issue advocacy" or "issue speech."[34] The *Buckley* Court confronted a statute that "require[d] direct disclosure of what an individual or group contributes or spends."[35] The Court stated, "[i]n considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way."[36] Thus, the Court required that "the subordinating interests of the State… survive exacting scrutiny."[37] And, under exacting scrutiny, the Supreme Court "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed."[38]

In the almost 60 years since *NAACP v. Alabama* and the over 40 years since *Buckley*, the right to engage in issue speech and the right to associate – and to associate privately – in order to more effectively debate policies and issues has neither changed nor diminished. Rather, as the Supreme Court recently held in *Citizens United*, laws that burden these fundamental rights must continue to meet "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[39]

H.B. 1498 threatens the right of private association by mandating intrusive donor disclosure for organizations. The disclosure, therefore, threatens citizens with harassment, misinforms the public about who supports a specific advertisement or communication, and produces "junk disclosure" that intrudes on the privacy of Maryland residents.

b. Disclosure information can result in the harassment of individuals by their ideological opponents and should be carefully balanced with the public's "right to know."

The reporting requirements proposed in H.B. 1498 could lead to the harassment of donors based on their beliefs. In today's polarized political environment, more and more individuals have suffered threats, harassment, and property damage as a result of this compulsory disclosure information.

For example, the United States District Court for the Central District of California recently held a trial on the threats faced by organizations during these tumultuous times. Donors to the Americans For Prosperity Foundation ("AFPF") "faced threats, attacks, and harassment, including death threats."[40] And those threats extended broadly to AFPF's "employees, supporters and donors."[41] For example, a "technology contractor working inside AFPF headquarters posted online that he was 'inside the belly of the beast' and that he could easily walk into [the Chief Executive Officer's] office and slit his throat."[42] The individual making the threats was seen "in AFP[F]'s parking garage, taking pictures of employees' license plates."[43] Likewise, a major donor to AFPF recounted the story of attending an event in Washington, D.C., at which protestors shoved both him and a woman in a wheelchair as they attempted to exit an AFPF event.[44]

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[33] 424 U.S. at 14.
[34] *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003).
[35] 424 U.S. at 75.
[36] *Buckley*, 424 U.S. at 75; *see also id.* at 66 (noting "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.").
[37] *Id.* at 64 (collecting cases).
[38] *Id.*
[39] *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66).
[40] *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Ca. 2016) (internal citation to hearing transcripts omitted).
[41] *Id.* at 1055.
[42] *Id.* at 1056 (internal citation omitted).
[43] *Id.* (internal citation omitted).
[44] *Id.* (internal citation omitted).

Compelling the public disclosure of the names and addresses of individuals only heightens the fears of those in the middle of such tumult and civic strife. The court summarized: "The Court can keep listing all the examples of threats and harassment presented at trial; however, in light of these threats, protests, boycotts, reprisals, and harassment directed at those individuals publically associated with AFP[F], the Court finds that AFP[F] supporters have been subjected to abuses,"[45] warranting protection from public disclosure.

But AFPF's woes are not unique. Last year, individuals who contributed to the Hillary Clinton campaign faced death threats.[46] Supporters of ballot measures in California also endured death threats.[47] Employees at the New York Civil Liberties Union and Goldwater Institute faced threats and harassment at their workplaces – and at their homes – due to their organizations' positions.[48] Nor is the media immune, as newspaper staff have faced death threats for their employer's political endorsements.[49] Even delegates to both major political parties' national nominating conventions in 2016 faced death threats.[50] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, disclosure carries real danger to donors and employees of organizations speaking on hot button issues.

Presumably, if the private information of donors to similar groups in Maryland were forcibly reported to the government, Maryland residents would also be at risk. To be clear, H.B. 1498 would extend the same type of disclosure to supporters of any nonprofit that even incidentally engages in political speech.

c. The bill will produce "junk disclosure" that associates a donor with a communication they have no knowledge of or may not even support – and who may even disagree with it.

The Supreme Court has explicitly defined the government's informational interest in disclosure as "increas[ing] the fund of information concerning those who *support* the candidates," such that voters can better define "the candidates' constituencies."[51] Consequently, the Court restricted the government's informational interest to situations involving "spending that is unambiguously related to the campaign of a particular… candidate,"[52] because it was only in that context that disclosure would provide any information about a candidate's *supporters*. House Bill 1498 departs from this informational interest and incorrectly

[45] *Id*.
[46] *See, e.g.*, Casey Sullivan, "After Clinton Donation, Legal Recruiter Complains of Death Threat," *Bloomberg Law*. Retrieved on April 13, 2017. Available at: https://bol.bna.com/after-clinton-donation-legal-recruiter-complains-of-death-threat/ (October 11, 2016).
[47] *See, e.g.*, Brad Stone, "Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword," *The New York Times*. Retrieved on April 13, 2017. Available at: http://www.nytimes.com/2009/02/08/business/08stream.html (February 7, 2009).
[48] *See, e.g.*, Donna Lieberman and Irum Taqi, "Testimony of Donna Lieberman and Irum Taqi on Behalf of the New York Civil Liberties Union Before the New York City Council Committee on Governmental Operations Regarding Int. 502-b, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union. Retrieved on April 13, 2017. Available at: http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration; Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal*. Retrieved on April 13, 2017. Available at: http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180 (September 22, 2016).
[49] *See, e.g.*, Kelsey Sutton, "Arizona Republic receives death threats after Clinton endorsement," *Politico*. Retrieved on April 13, 2017. Available at: http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889 (September 29, 2016).
[50] *See, e.g.*, Alan Rappeport, "From Bernie Sanders Supporters, Death Threats Over Delegates," *The New York Times*. Retrieved on April 13, 2017. Available at: http://www.nytimes.com/2016/05/17/us/politics/bernie-sanders-supporters-nevada.html?_r=0 (May 16, 2016); Eli Stokols and Kyle Cheney, "Delegates face death threats from Trump supporters," *Politico*. Retrieved on April 13, 2017. Available at: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302 (April 22, 2016).
[51] *Buckley*, 424 U.S. at 81 (emphasis added).
[52] *Id*. at 80.

assumes that giving to an organization, without earmarking or some other indicia of support for a particular communication, is support for *all* speech by the organization.

Consequently, H.B. 1498 creates "junk disclosure" by associating donors with speech over which they have no control. By mandating general donor disclosure, and not just the listing of those who earmarked their money for campaign activity, the state mistakes general support for an organization with support for a specific communication.

For example, consider a hypothetical Maryland resident in Rockville who is a proud, life-long Democrat and who owns a small paratransit company to help elderly residents get to doctor and dentist appointments. She is a member of and donates to the Taxicab, Limousine & Paratransit Association ("TLPA"), because she believes the organization generally represents her views and concerns about her profession. But one day she is listed as *opposing* Democrats in Baltimore because the TLPA decides to run ads critical of the Baltimore's City Council's new regulations on ridesharing apps like Uber. Or consider a Salisbury resident who is a staunch Republican and member of Maryland for Responsible Enforcement who, because of H.B. 1498, is listed as opposing Republicans – because the organization ran a communication close to an election detailing how a few Republicans were in favor of speed cameras in Cumberland. In both situations, neither of these individuals knew about or agreed with the organization's specific position. They instead opted to donate to these groups not because they agree with everything their trade association or a particular advocacy organization does, or specific policy positions they take, but because on balance they think these organizations provide a voice for their views. But, under H.B. 1498, they may be listed as supporting communications they disagree with, simply because they support the organization making the communication.

When we speak of candidates, political committees, and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups. However, if a group decides to engage in the extremely broad types of communications covered in the bill, many of its donors could potentially be made public.[53] All donors of $10,000 or more will be disclosed, regardless of whether their donations were earmarked for the purpose of furthering an independent expenditure or electioneering communication.[54]

To publicly identify these individuals with expenditures of which they had no advance knowledge, and which they may even oppose, is unfair to these citizens and misleads the public. The disclosure serves little purpose other than to provide a basis for official or private harassment.

[53] As mentioned previously, the federal campaign finance laws have an earmarking requirement for such independent expenditures and electioneering communications. 11 C.F.R. § 104.20(c)(9); *Van Hollen*, 811 F.3d at 501.

[54] H.B. 1498 §1 at p. 19 (adding §§ 13-309.2.(c)(3)(ii)) *cf.* Md. Election Law Code Ann. § 13-306(e)(5) (independent expenditure disclosure threshold); Md. Election Law Code Ann. § 13-1307(e)(5) (electioneering communications disclosure threshold). In fact, to avoid disclosure, H.B. 1498 requires the donor to "expressly agree in writing [that the donation] may not be used for" independent expenditures or electioneering communications. H.B. 1498 §1 at p. 17 (adding §§ 13-309.2.(a)(2)(ii)(2)); *cf.* Md. Election Law Code Ann. §§ 13-306(a)(2)(ii) and 13-307(a)(2)(ii). In this way, the donor must "reverse earmark" – say what the funds cannot be used for – in order to not be disclosed.

III. House Bill 1498 dissolves limited liability for corporations, overturning the very purpose of the corporate form, and silences Maryland's workers because of errors made by their employers.

The modern corporate form exists, in part, to provide the "shield of limited liability,"[55] as well as to provide some permanence to enterprise,[56] and alleviate redundant tax burdens.[57] But H.B. 1498 pierces the corporate veil and attaches joint-and-several liability to natural persons – Maryland citizens – if a § 501(c)(4) or § 501(c)(6) organization is late in filing an independent expenditure report or electioneering communication report. Indeed, the treasurer and whomever directs the organization may not be able to engage in *other* speech in their *personal capacities* until the corporation pays its fine. Thus, H.B. 1498 not only removes a chief feature of the corporate form, it restricts the private activity of Maryland's citizens.

H.B. 1498 changes the penalty process for failing to register and report in a timely fashion. Under the proposed legislation, if a "participating organization" fails to timely file its reports, then the organization, its treasurer, and "the person exercising direction or control over the activities" of the organization are held jointly-and-severally liable.[58] For independent expenditure reports and electioneering communications reports, the penalties for filing late are quite high: $1,000 for *each day* a report is overdue, or 10% of the value of unreported donations and expenditures, whichever is greater.[59]

But the bill intensifies the penalties by restricting the ability of the treasurer and anyone who exercises control over an organization from "serv[ing] as the responsible officer of a political committee" or in aiding in the formation of a political committee.[60] Indeed, affected citizens are banned from "serv[ing] in *any position* of responsibility" under the Election Code.[61]

In effect, the treasurer or someone who can control a "participating organization" risks their *personal* ability to engage in politics if their organization forgets to file a report and pay the steep penalty. For example, hypothetically, if Gender Rights Maryland failed to timely file an electioneering communications report, then H.B. 1498 would prohibit the organization's executive director and chair of the board, real flesh and blood people, from participating in political committees in their personal capacities. Because doing so is a core First Amendment right, H.B. 1498 essentially holds an element of their citizenship hostage to a reporting schedule. This is disproportionate in any event, but especially absent some concrete and compelling proof that the situation requires such drastic measures.

Not only does H.B. 1498's effect violate the very essence of the corporate form, it restricts the First Amendment rights of organizations' employees. Maryland should not be seeking such draconian measures

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[55] *See, e.g.* Robert W. Hamilton, The Law of Corporations in a Nutshell, § 1.5 (5th ed. 2000).
[56] *Id*. at § 2.1.
[57] *Id*. at § 1.20.
[58] H.B. 1498 § 1 at p. 8 (adding § 13-306.(j)(3)(iii) for penalties for failing to report independent expenditures reports); *id*. at §1 at p. 13 (adding § 13-307.(j)(3)(iii) for penalties for failing to report electioneering communications reports); *id*. at p. 20 (adding § 13-309.2.(g)(3)(iii) for penalties for failing to report participating organization reports).
[59] H.B. 1498 §1 at p. 20 (adding §§ 13-309.2.(g)(2) for penalties for participating organizations). This is similar for the penalties already in place elsewhere in the code for failing to report. Md. Election Law Code Ann. §§ 13-306(i)(2)(i) and 13-307(i)(2)(i); *but compare* Md. Election Law Code Ann. §§ 13-306(i)(2)(ii) and 13-307(i)(2)(ii) (lessening the penalties if the missing report's deadline was more than twenty-eight days before an election for late independent expenditure reports or electioneering communications reports).
[60] H.B. 1498 § 1 at p. 8 (adding §§ 13-306.(k)(1) and (3) for failing to pay an independent expenditure report penalty); *id*. at p. 14 (adding § 13-307.(k)(1) and (3) for failing to pay an electioneering communication report penalty); *id*. at p. 21 (adding §§ 13-309.2.(h)(1) and (3) for participating organizations).
[61] H.B. 1498 § 1 at p. 8 (adding §§ 13-306.(k)(2) for failing to pay an independent expenditure report penalty); *id*. at p. 14 (adding § 13-307.(k)(2) for failing to pay an electioneering communication report penalty); *id*. at p. 21 (adding § 13-309.2.(h)(2) for participating organizations) (emphasis added).

when the civil penalties for failing to timely file a report are already high and serve the purpose of promoting campaign finance reporting compliance.

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House Bill 1498 seeks to improve transparency, but ultimately provides little useful information to Marylanders. What H.B. 1498 will do is discourage donors and workers from contributing to useful nonprofit organizations, and subject them to potential harassment. Therefore, we respectfully suggest that your office carefully consider the constitutional and practical difficulties posed by H.B. 1498.

Thank you for allowing me to submit comments on House Bill 1498. I hope you will find this information helpful. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully submitted,

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